

## Third party litigation funding in Ireland: time for change?

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## **Third Party Litigation Funding in Ireland: Time for Change?**

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### *Abstract*

Third party litigation funding (TPLF), whereby a third party funds litigation brought by a claimant in return for a share of any monetary remedy obtained, has gained widespread acceptance in the common law world. Traditional objections, based upon the ancient principles of maintenance and champerty, are being swept away. In light of that the current refusal of the Irish courts to embrace TPLF is looking increasingly unsustainable. Maintenance and champerty remain concerns to the extent that they may involve the corruption of public justice. But this, and other regulatory issues posed by TPLF, can be managed. This article, by drawing upon the experience of other common law jurisdictions, indicates how Ireland can permit third party funders to support litigation without damaging the purity of civil justice.

### **Introduction**

Third party litigation funding (TPLF) occurs where a third party provides financial support for litigation brought by a claimant (C) against a defendant (D) in return for payment from any monetary relief that C may be awarded by way of judgment or out of court settlement. TPLF is mainly offered to claimants although a defendant with a substantial counterclaim may also be able to obtain it.

TPLF's entry to the civil litigation stage needs to be understood in the context of the very expensive nature of civil litigation, the 'loser pays' costs rule applicable in many legal jurisdictions, and the reduced availability of legal aid.<sup>1</sup> It is consequently an access to justice issue although the overwhelming use of TPLF in England for very large commercial claims may leave sceptics unenthusiastic about its utility value in this context.<sup>2</sup> Funders invest in legal actions to make money rather than to support civil rights or other worthy causes.<sup>3</sup> However the authors of the Litigation Funding Research Report did note that the market is

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<sup>1</sup> C. Hodges, J. Peysner, and A. Nurse, *Litigation Funding: Status and Issues* (Research Report, January 2012) (Litigation Funding Research Report) p. 38 (with few exceptions legal aid has proved to be an unsustainable public expenditure programme and is in retreat across the world), and p. 16 (pointing out that in England and Wales eligibility for legal aid nearly halved between 1998 and 2007 to 29% of the population).

<sup>2</sup> *Ibid*, at p. 7. The authors found that the minimum claim value before TPLF would be offered was about £100,000 but with a figure of £1m being the true threshold in most cases.

<sup>3</sup> J. Kalajdzic, P. Cashman, and A. Longmoore, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding' (2013) 61 *American Journal of Comparative Law* 93, at 142.

expanding in England<sup>4</sup> and that TPLF is the usual way of financing class actions in Australia.<sup>5</sup> Highly significant issues are raised by the use of TPLF in class actions but these are beyond the scope of this article. The article's principal objective is to encourage a serious reconsideration of TPLF in Ireland where it is not permitted at the present time. Confining the discussion to litigation between an individual C and an individual D will make this task simpler. Sceptics may also argue that in England and other jurisdictions a variety of conditional and contingency fee arrangements provide access to justice and protection against costs' liability for claimants with different types of claim from those that are the staple diet of TPLF in England. Whatever the truth of this it does not of itself justify denying litigants the option of TPLF where other funding schemes are unsuitable or litigants consider it preferable.

In Ireland TPLF has been considered to a varying degree in four decisions since 2011; one of these went to the Court of Appeal on a different issue, and the last was decided by the Supreme Court on 23<sup>rd</sup> May 2017.<sup>6</sup> The ground on which TPLF has been declared invalid in Ireland is that it constitutes maintenance and champerty which remain both torts and crimes in Ireland by virtue of the Statute Law Revision Act 2007. In these decisions the Irish courts have declared that the mere provision of financial support for litigation constitutes unlawful maintenance; and consequently if that support is provided in consideration of payment from any damages recovered this constitutes champerty. This article will contend, by virtue of a discussion of case law from other common law jurisdictions, that this view of the nature and scope of maintenance and champerty is inordinately broad. The removal of this automatic bar to TPLF would not mean its adoption without addressing some further issues that TPLF presents. Some of these issues are concerned with whether the way a litigation funding agreement (LFA) works in a particular case constitutes maintenance and champerty. Abolition of the torts and crimes of maintenance and champerty will be recommended but not the rules making contracts tainted by maintenance and champerty invalid. Other issues are concerned with the protection of defendants sued by claimants supported by TPLF and others are wider regulatory issues. Ireland could decide that these issues still make TPLF undesirable although this would be taking a different position from the one being increasingly followed in other common law jurisdictions. This article will

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<sup>4</sup> *Supra* n. 1, at p. 141. The recent introduction of a competition law class action in England may bring about further expansion of the market in England. See R. Mulheron, 'Third Party Funding and Class Actions Reform' (2015) 131 *LQR* 291.

<sup>5</sup> *Supra* n. 1, at p. 49. These were mainly securities class actions and financial services cases. Small value claims tend not to be pursued in this way although for an example of a class action seeking recovery of overpaid tax by small tobacco retailers see *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; P. Cashman, 'Litigation Funding for Representative Actions: *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*' (2005) 68 *Precedent* 27; L. Aitken, 'Before the High Court: "Litigation Lending" After *Fostif*: An Advance in Consumer Protection or a Licence to "Bottomfeeders"?' (2006) 28 *Sydney Law Review* 171; M. Legg and G. Williams, 'The High Court Gives Litigation Funding Legitimacy, Yet Questions Remain' (2006) 44(9) *Law Society Journal* 53'; D. Capper, 'Maintenance and Champerty in Australia: Litigation in Support of Funding!' (2007) 26 *CJQ* 288.

<sup>6</sup> *Thema International Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357 (Clarke J); *Greenclean Waste Management Ltd v Leahy p/a Maurice Leahy & Co Solicitors* [2014] IEHC 314 (Hogan J), and on appeal to the Court of Appeal [2015] IECA 97; *SPV Osus Ltd v HSBC International Trust Services (Ireland) Ltd* [2015] IEHC 602 (Costello J); *Persona Digita Telephony Ltd v The Minister for Public Enterprise & Ors* [2016] IEHC 187 (Donnelly J), [2017] IESC 27.

recommend acceptance of TPLF in Ireland and the taking of necessary measures at judicial and other regulatory levels to address the issues that would follow from acceptance.

TPLF is particularly topical in Ireland at present because it featured in the Law Reform Commission's 2016 Issues Paper concerned with the administration of justice.<sup>7</sup> Issue 6 of this paper is concerned with 'Maintenance and Champerty' and sets out the current litigation support available to persons undertaking civil litigation in Ireland today. 'No win no fee' arrangements, under which a solicitor may enter into a contract with a client where the solicitor will not be paid if the client fails to obtain a remedy, are accepted by the courts as valid.<sup>8</sup> However, unlike English conditional fees available under section 58A of the Courts and Legal Services Act 1990, no success fee may be charged in the event of a favourable outcome. Contingency fee agreements (under which a lawyer is paid a percentage of an award of damages) are invalid under section 149 of the Legal Services Regulation Act 2015. After the event insurance, useful in meeting the costs of successful defendants where litigation is undertaken pursuant to 'no win no fee' arrangements, is also valid.<sup>9</sup> Issue 6 concludes with a two page discussion of whether legislation should be introduced allowing TPLF in Ireland, followed by a list of six questions. Answers to those will be provided, where relevant, in the conclusion to this article.

It should be noted that there is no publically funded legal aid available in Ireland and that a scan of the list of published judgments in the superior courts in recent years reveals a substantial number of litigants in person. Many of these are defendants desperately trying to escape liability for debt obligations incurred during the boom years of the previous decade but some are claimants. Few such defendants would interest a litigation funder because the likelihood of recovering any money from which the funder could be paid is very slim but they are part of the wider context in which the debate on TPLF needs to take place.

Section 1 of this article will show, from the perspective of other common law jurisdictions, that TPLF is not *per se* something which involves maintenance and champerty. Section 2 is a detailed analysis of the Irish case law on this subject, demonstrating how judicial opposition to TPLF based on the proposition that it intrinsically constitutes maintenance and champerty, is unsound. Section 3 will consider the challenging issues that Ireland will have to address if it decides to abandon the current anti-TPLF position. The conclusion will advocate acceptance of TPLF and answer the relevant questions from Issue 6 of the Law Reform Commission's Issues Paper.

## **1. Does TPLF Constitute Maintenance and Champerty? – the View from Other Jurisdictions**

Maintenance and champerty have been defined as follows:-

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<sup>7</sup> Law Reform Commission, *Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10-2016).

<sup>8</sup> Citing *McHugh v Keane* (unreported, High Court, 16 December 1994); *Synnott v Adekoya* [2010] IEHC 26 (Laffoy J).

<sup>9</sup> *Greenclean Waste Management Ltd v Leahy (No 2)* [2014] IEHC 314 (Hogan J).

“Maintenance may be defined as the giving of assistance or encouragement to one of the parties to the litigation by a person who has neither an interest in litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.”<sup>10</sup>

While remaining mindful of the fact that one must not treat the language of a treatise as if it were a statute, two things are clear from the above quotation. In reverse order they are that an agreement cannot be tainted by champerty unless it constitutes maintenance, and secondly, it cannot be maintenance unless the assistance or encouragement is *sans* interest in the particular litigation or other motive recognised by law.

That the giving of financial assistance to a party to pursue litigation is not by itself maintenance follows reasonably clearly from the judgment of Lady Hale in *Massai Aviation Services v Attorney General*,<sup>11</sup> where her ladyship pointed out that most litigation that has come before the courts for several decades now has been supported by trades unions, insurance companies or legal aid and was not considered to involve unlawful maintenance. This was a very material consideration in the Law Commission of England and Wales recommending the abolition of the crimes and torts of maintenance and champerty by sections 13(1) and 14(1) of the Criminal Law Act 1967.<sup>12</sup> However, any attempt to justify the invalidity of TPLF in Ireland cannot rely on the retention of the crimes and torts of maintenance and champerty by the Statute Law Revision Act 2007 in that country because section 14(2) of the Criminal Law Act 1967 retained maintenance and champerty as rules of public policy in England. A blanket ban on TPLF because it savours of maintenance and champerty must show that TPLF is without more maintenance and champerty.

To constitute unlawful maintenance in English law the third party’s conduct must have a tendency to corrupt public justice.<sup>13</sup> This typically occurs where the maintainer encourages the bringing of litigation that would not otherwise be brought, such as where the maintainer takes over litigation the true claimant showed no interest in pursuing in order to harass the defendant.<sup>14</sup> The Law Reform Committee in Singapore explained the problem in terms of ‘trafficking in litigation’, making money by creating, multiplying and stirring up disputes.<sup>15</sup> In this context it is significant that the assignment of a bare cause of action is still generally

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<sup>10</sup> *Halsbury’s Laws of England* (vol 9, 4<sup>th</sup> ed, Butterworths, London, 1974), at 272. Cited by Clarke J in *Thema International Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] IEHC 357, at 3.7 and 3.8. A longer but not substantively different definition may be found in the 5<sup>th</sup> edition, volume 22 at 438.

<sup>11</sup> [2007] UKPC 12, at [14].

<sup>12</sup> Law Commission, *Proposals for Reform of the Law relating to Maintenance and Champerty* (Law Com No 7, 1966), para 15.

<sup>13</sup> R. Mulheron and P. Cashman, ‘Third Party Funding: A Changing Landscape’ (2008) 27 *CJQ* 312, at 313.

<sup>14</sup> See Mulheron and Cashman *ibid*, at 333, citing *Re Trepcia Mines Ltd (No 2)* [1963] Ch 199, and *Buday v Locator of Missing Heirs Inc* (1993) 16 OR (3d) 257; P. Puri, ‘Financing of Litigation by Third-Party Investors: A Share of Justice?’ (1998) 36 *Osgoode Hall L. J.* 515, at 527; R. Mulheron, ‘England’s Unique Approach to the Self- Regulation of Third Party Funding: A Critical analysis of Recent Developments’ (2014) 73 *CLJ* 570, at 584, citing *Operation One Inc v Phillips* (2004) 248 DLR (4<sup>th</sup>) 349.

<sup>15</sup> *Report of the Law Reform Committee on Litigation Funding in Insolvency Cases* (Singapore Academy of Law, 2014), at para 30.

considered to be champertous,<sup>16</sup> although a wide exception to this rule allows insolvency office holders to assign an insolvent's right to sue to raise money for distribution to creditors.<sup>17</sup> The provision of funds to enable the claimant to bring its own case, even in exchange for a share of any recovery, does not of itself constitute any corruption of public justice. If the funder's actions go beyond the provision of financial support there may be a problem to which the third section of this article will return. But in and of itself TPLF does not constitute maintenance and champerty.

Recent case law from jurisdictions other than Ireland concerned with TPLF for financial reward will now be discussed in a little more detail. The first case chronologically was the Canadian decision in *Buday v Locator of Missing Heirs Ince*<sup>18</sup> where Locator agreed to assist the Ollman family in establishing their rights to a mining claim in return for 30% of their interest if successful. Despite affidavit evidence filed by Locator detailing the 'human interest story' in helping the Ollman family one should not lose sight of the fact that this was an agreement entered into by Locator for financial reward. The Ontario Court of Appeal thought there was nothing wrong with this kind of support.<sup>19</sup>

In England the first case conferring judicial blessing on TPLF purely for financial reward was *Giles v Thompson*.<sup>20</sup> A car rental company (C) provided car rental services to motorists involved in road traffic accidents where their insurance did not provide for the loan of a substitute vehicle while repairs were being carried out. The rental charges were personally payable by the motorists themselves but the rental agreement provided for C to take proceedings in the name of the motorist with a view to recovering all of the latter's losses arising out of the accident. The motorist remained liable for the costs of the proceedings if they were unsuccessful although the funder chose the solicitor to process the claim. The issue in the case was whether the rental charges were recoverable losses against the defendants. The defendants argued that they were not recoverable because C was unlawfully maintaining the legal actions for reward. It was pointed out that the accident claims, being rear collisions and similar accidents, were all practically certain to succeed and that the rental charges would all be paid to C out of the damages recovered. Speaking for a unanimous House of Lords, Lord Mustill said the issue was not whether C had any legitimate interest in the litigation but whether there had been any intermeddling in the litigation.<sup>21</sup> Although the funder chose the solicitor the latter was free from interference in managing the claim and the motorist remained liable for the costs in the admittedly remote chance that any claim failed. Technically C's interest was in the hire charges rather than the damages *per se* but as these were clearly going to come from the damages this was a

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<sup>16</sup> *Simpson v Norfolk and Norwich University Hospital NHS Trust* [2011] EWCA Civ 1149, [2012] QB 640.

<sup>17</sup> See *Seear v Lawson* (1880) 15 Ch D 426; *Guy v Churchill* (1888) 40 Ch D 481; *Glegg v Bromley* [1912] 3 KB 474; *Ramsey v Hartley* [1977] 1 WLR 686; *Groewood Holdings Plc v James Capel and Co Ltd* [1995] Ch 80; *Re Oasis Merchandising Services Ltd* [1995] BCC 911.

<sup>18</sup> (1993) 16 O.R. (3d) 257 (OCA).

<sup>19</sup> The significance of motive in determining whether litigation support constitutes unlawful maintenance was stressed in another Ontario case, *McIntyre Estate v Ontario (Attorney General)* [2002] OJ No 3417.

<sup>20</sup> [1994] AC 142 (HL).

<sup>21</sup> Citing here the test laid down by Fletcher Moulton LJ in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, at 1014: "wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse."

distinction without a difference. *Giles v Thompson* may be described as a ‘breakthrough’ case in terms of the acceptance of litigation funding for purely material reward.<sup>22</sup>

The next significant English decision was *R (Factortame Ltd and others) v Secretary of State for Transport, Local Government and the Regions (No 8)*.<sup>23</sup> The claimants sought damages against the United Kingdom government for preventing them from fishing in British waters, contrary to European Union law. At the time of entering into the funding agreement about to be described the government was pursuing an appeal to the House of Lords which, as expected, failed. The funding agreement concerned the quantification of the claimants’ damages, for which Grant Thornton (GT), chartered accountants, were engaged to conduct a forensic accountancy exercise. As the claimants had no other means of paying GT’s charges the funding agreement provided that 8% of any damages recovered would be paid to GT. GT appointed and paid independent fisheries and forensic accountancy experts to do the forensic accountancy work, retaining for itself the overall supervisory responsibility for the claim. GT provided some significant support for the litigation in terms of collecting documentary evidence and advising on settlement offers. In allowing GT to keep its share of the profits the Court of Appeal emphasised that there was no real risk of an abuse of process in this arrangement. There was no other way GT could be paid, their charges were moderate and proportionate, they were members of a reputable profession, they had no role in the appeal to the House of Lords and they had retained independent expert witnesses to perform the damages calculation. Just as in *Giles v Thompson*, the only issue considered by the court was abuse of process. It should be noted that this case is not entirely one where the litigation funder was actuated by a purely profit motive, as GT were owed approximately £200,000 in professional fees by the fishing companies, so assisting them to recover damages would provide the funds from which these fees could be paid.

Probably the clearest signal that TPLF has attained legitimacy in England was provided by those decisions from the middle of the last decade where the courts effectively said that so long as the litigation funder can be made to bear a reasonable portion of a successful defendant’s costs TPLF is immune from maintenance and champerty. The attitude of the courts can now be stated as allowing funders to support litigation for profit provided they pay at least some of the costs incurred by the defendant in successfully resisting the claim. This is an important principle of fairness because as O’Dair has pointed out<sup>24</sup> defendants do not choose to go to court. A defendant faced by an impecunious claimant faces a substantial risk of being unable to recover its costs in the event that it wins the case. In principle it seems right that the funder who exposed the defendant to that risk should at least contribute to meeting those costs. In *Hamilton v Al Fayed (No 2)*<sup>25</sup> the Court of Appeal declined to grant a third party costs order under section 51 of the Senior Courts Act 1981 against third party funders who were political sympathisers with the claimant. This was considered to be a traditional ‘not for profit’ legitimate interest in the claimant’s cause.

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<sup>22</sup> D. Capper and L. Glennon, ‘Litigation Funding for ‘Big Money’ Divorces: An Assessment of Legal Risk’ (2007) 26 *CJQ* 447.

<sup>23</sup> [2002] EWCA Civ 932, [2003] QB 381 (CA).

<sup>24</sup> DRF O’Dair, ‘Lawyers’ Ethics, Settlement Negotiations and the Maintainer’s Liability for Costs: Cases in Search of a Principle’ (1997) *LMCLQ* 156, at p. 160.

<sup>25</sup> [2002] EWCA Civ 665, [2003] QB 1175 (CA).

Later in *Arkin v Borchard Lines Ltd*<sup>26</sup> the Court of Appeal granted a section 51 order against professional funders but limited it to the extent of the funding provided. In other words, the defendant could recover from the third party funder no higher sum than that funder had contributed to the claimant's litigation. The 'Arkin' cap is much criticised as offering an insufficient protection to defendants against potentially unrecoverable costs and further discussion will be directed to this issue below. For now the decision's significance lies in the judicial recognition that there is nothing inherently objectionable about TPLF so long as the funder has to accept the necessary *quid pro quo* for its pursuit of profit.

In concluding this section it is helpful to enquire about the historical origins and essential purposes of maintenance and champerty. These principles have their origin in medieval times when powerful men of influence would buy up other persons' laws suits to use them as weapons of harassment against their enemies.<sup>27</sup> As Lady Hale expressed it in *Massai Aviation Services v Attorney General*:-

"The original policy of the law was to protect vulnerable defendants, who might be unable to resist unmeritorious claims which were being pursued against them with the help of the rich and powerful .... A later object was to protect vulnerable plaintiffs, who might be induced to part with some of the proceeds of their action in return for assistance in pursuing it: hence both conditional and contingency fee arrangements with legal advisers were prohibited. However, just as the need to protect vulnerable defendants has receded, so too have we come to appreciate that "treating such arrangements as criminal was also, before the introduction of legal aid, an effective way of preventing poor people from obtaining legal redress": see *Norglen Ltd v Reeds Rains Prudential Ltd* 1999] 2 AC 1, per Lord Hoffmann at 11."<sup>28</sup>

Financial assistance for litigation is not by itself capable of being an abuse of the process of the court. Denial of funds to bring a law suit is a denial of access to justice. With respect to TPLF the current legal position in England may be summarised in the following propositions of Coulson J in *London & Regional (St George's Court) Ltd v Ministry of Defence*:-

- The mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable.
- In considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has *a tendency to corrupt public justice*, and such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement.

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<sup>26</sup> [2005] EWCA Civ 655, [2005] 2 Lloyd's Rep 187 (CA).

<sup>27</sup> See Holdsworth, *A History of English Law* (London, Sweet & Maxwell, 3<sup>rd</sup> ed, 1924) vol 3 pp 395-399, vol 5 pp 201-203, vol 7 pp 523-524; *Neville v London 'Express' Newspaper Ltd* [1919] AC 368, 414 (Lord Shaw referring to Hawkins, *Pleas of the Crown*); P.H. Winfield, 'The History of Maintenance and Champerty' (1919) 35 *LQR* 50; Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty*, Law Comm No 7, 1966, para 2.

<sup>28</sup> *Supra* n. 11, at [13].



- The modern authorities demonstrated a flexible approach where courts have generally declined to hold that an agreement under which a party has provided assistance with litigation in return for a share of the proceeds is unenforceable.
- The rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process.<sup>29</sup>

To this may be added Mulheron's observation that in addition to the courts of England and Wales the courts of Jersey, Canada, New Zealand, Australia, Bermuda, South Africa, and a few European Union states have also accepted TPLF.<sup>30</sup> The next section of this paper attempts to explain why Ireland has so far not followed where others have led.

## 2. The Position of the Irish Courts

The case law will again be discussed in chronological order. Only the last of the decisions noted above<sup>31</sup> actually decided that TPLF is not permitted in Ireland but the Supreme Court judgments in that case essentially treated dicta from the previous High Court decisions as accurate statements of the law.

*Thema International Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd*<sup>32</sup> is the first decision. In this case the defendant applied for disclosure orders as to how the plaintiff company was being funded. The defendant argued that it was entitled to know the true identity of its adversary, that this was necessary to enable the defendant to apply for security for costs in timely fashion, and necessary also to enable the defendant to apply for a third party costs order against the funder. The judge refused the relief sought for several reasons. The one that matters most in the present context was that the third party funders had legitimate interests in funding the plaintiff's case and were not purely commercial funders supporting the plaintiff for profit. This took the case outside the rules about maintenance and champerty<sup>33</sup> and meant that the argument coming from the need to know one's real adversary did not have sufficient weight to counterbalance the undoubted litigation disadvantage in disclosing details of the plaintiff's funding arrangements.<sup>34</sup> Implicit in this is the proposition that if the plaintiff's case had been brought with the support of purely commercial funders a disclosure order would have been made. Clarke J stated four times in a nine paragraph section of his judgment that TPLF was not permitted in Ireland<sup>35</sup> while citing no authority for this proposition or explaining why this was so as a matter of principle. He stated that maintenance and champerty remained part of the law in Ireland<sup>36</sup> but this is nothing to the point as it remains part of the law of several jurisdictions that have

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<sup>29</sup> [2008] EWHC 526 (TCC), at [103].

<sup>30</sup> Mulheron, *supra* n. 14, at 573. To this may be added some states of the USA; see N. Dietsch, 'Litigation Financing in the U.S., the U.K., and Australia: How the Industry has Evolved in Three Countries' (2011) 38 *Northern Kentucky L. Rev.* 687.

<sup>31</sup> *Supra* n. 6.

<sup>32</sup> [2011] IEHC 357 (Clarke J).

<sup>33</sup> *Ibid*, at 3.6.

<sup>34</sup> *Ibid*, at 5.10.

<sup>35</sup> *Ibid*, at 5.3-5.11.

<sup>36</sup> *Ibid*, at 5.3.

accepted TPLF. While the crimes and torts of maintenance and champerty remain part of the law in Ireland, in contrast to some other jurisdictions, this does not help much in determining whether TPLF actually constitutes maintenance and champerty.<sup>37</sup> Clarke J also suggested that case law from other jurisdictions should not be followed because those judicial decisions had altered the law in those jurisdictions and the law had not been altered in Ireland.<sup>38</sup> Quite apart from the failure to cite any authority for the state of Irish law on TPLF it is highly unlikely that any of the learned judges who decided those cases from other jurisdictions would think that they had changed the law. What they did was determine whether the ancient principles on maintenance and champerty were to be applied to TPLF. This was no more than the traditional common law method of developing the law case by case.

A much sounder discussion of maintenance and champerty appeared in the decision of Hogan J in *Greenclean Waste Management Ltd v Leahy p/a Maurice Leahy and Co Solicitors (No 2)*.<sup>39</sup> In that case the learned judge was asked to determine whether after the event (ATE) insurance was illegal in Ireland because of maintenance and champerty or analogous public policy considerations. Hogan J decided that it was not. The judgment began with the observation that the significance of the abolition of the crimes and torts of maintenance and champerty in England by virtue of the Criminal Law Act 1967 may be overstated since section 14(2) of that Act preserves the doctrines of maintenance and champerty as rules of public policy and English case law still evidences hostility to anything that smacks of trafficking in litigation, citing *Simpson v Norfolk and Norwich University Hospital NHS Trust*.<sup>40</sup> Later Hogan J went on to say that the law of champerty must be viewed in accordance with modern ideas of propriety. The rules were formulated in an era before legal aid, trade unions, and community and voluntary groups, many of whom frequently offer financial support for litigation. Access to justice is a constitutional fundamental under Article 34.1 of the Constitution and methods by which litigants can be assisted by others should be scrutinised with this right in mind.<sup>41</sup> Agreements that involve trafficking in litigation or the assignment of a bare cause of action as in *Simpson* are void, and are the true *leitmotif* that runs through the case law in this area.<sup>42</sup> The reasoning of *Giles v Thompson* – in the admittedly different atmosphere of the aftermath of the 1967 Act – applied by analogy to the present proceedings.<sup>43</sup> If the only relevant features of the ATE in issue had been the size of the premium and the fact that it was only payable in the event of settlement or victory in court then the decision might well have been that it fell foul of maintenance and champerty.<sup>44</sup> But its provision of access to justice for persons and entities who might otherwise have been denied it justified the conclusion that, judged by modern conceptions of propriety, this ATE did not constitute trafficking in litigation.<sup>45</sup> This is a very refreshing

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<sup>37</sup> The crimes and torts of maintenance are still extant in New Zealand but the courts do not regard litigation funding agreements as automatically unenforceable on this ground. See *Saunders v Houghton* [2010] 3 NZLR 331.

<sup>38</sup> *Supra* n. 32, at 5.6.

<sup>39</sup> [2014] IEHC 314.

<sup>40</sup> *Supra* n. 16, referred to at *ibid*, para 9.

<sup>41</sup> *Ibid*, at 23-24.

<sup>42</sup> *Ibid*, at 25.

<sup>43</sup> *Ibid*, at 34.

<sup>44</sup> *Ibid*, at 35.

<sup>45</sup> *Ibid*, at 36 and 38.

judgment that avoids making unsustainable propositions about the state of the law in Ireland and how it has been altered elsewhere, and genuinely attempts to apply binding principles in a manner displaying an appreciation of contemporary context.

Little needs to be said about the appeal to the Court of Appeal in the *Greenclean* case.<sup>46</sup> Hogan J's decision was reversed but the sole ground of appeal was whether the existence of the ATE meant that there was no need to order security for costs against the plaintiff. For reasons not significant to this article it was held that the presence of ATE was no reason to refuse security for costs. Nothing appeared in the judgment of Kelly J to cast any doubt upon the proposition that ATE does not of itself constitute maintenance and champerty.

The next decision of relevance in this area is *SPV Osus Ltd v HSBC International Trust Services (Ireland) Ltd*.<sup>47</sup> In this case the defendant was granted a dismissal of the plaintiffs' claims as the assignment to the plaintiffs was the assignment of a bare cause of action. It was not incidental to a property right and the plaintiffs had no genuine commercial or other interest in receiving the claim. Costello J asserted that as the court was concerned with a question of Irish public policy, decisions from other jurisdictions as to what is acceptable were of limited assistance.<sup>48</sup> The judge then referred to four previous Irish authorities – *Fraser v Buckle*,<sup>49</sup> *O'Keeffe v Scales*,<sup>50</sup> *Thema International Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd*,<sup>51</sup> and Hogan J's judgment in *Greenclean Waste v Leahy*<sup>52</sup> - from which she derived 14 principles set out at paragraph 40. Most of these are unproblematic and the only ones that this article need be concerned with are principle 12 (a professional third party funder who makes a commercial decision to invest in litigation to make a profit commits the torts of maintenance and/or champerty), and principle 9 (the interest which a party enjoys in a suit which (s)he is maintaining must exist independently of the agreement which gives him or her a share in the proceeds of the suit). With respect to the judge, none of the authorities cited offer much support for principle 12 and principle 9 is only referred to because TPLF seems a paradigm case of someone enjoying a right to the proceeds of a suit entirely because of the agreement conferring it.

Turning now to the authorities cited by Costello J, *Fraser v Buckle* was a case about an heir-locator's contingency fee agreement with a beneficiary under an intestate estate. This kind of agreement is one whereby an heir-locator, who has discovered the whereabouts of a likely beneficiary of the estate, enters into an agreement with the beneficiary under which the latter agrees to cede to the heir-locator a very large portion of their inheritance for the heir-locator's assistance in recovering it. Judicial hostility to these agreements is easy to understand. The heir-locator is seeking payment for work already done ascertaining the beneficiary's entitlement without ever asking the beneficiary if (s)he would like it done. The heir-locator cannot afford to share any meaningful information with the beneficiary as to his or her entitlement (e.g, name of deceased or personal representative) because the latter

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<sup>46</sup> [2015] IECA 97.

<sup>47</sup> [2015] IEHC 602 (Costello J).

<sup>48</sup> *Ibid*, at 30.

<sup>49</sup> [1996] 2 ILRM 34 (SC), referred to at paras 31-33.

<sup>50</sup> [1998] 1 IR 290 (SC), referred to at para 34.

<sup>51</sup> *Supra* n. 6, referred to at paras 35-36.

<sup>52</sup> *Supra* n. 6, referred to at paras 37-39.

would then be able to assert their claim without the heir-locator's assistance.<sup>53</sup> And the frequently enormous 'contingency' fee charged by the heir-locator is usually on the false premise that there is some risk that all the heir-locator's efforts on the beneficiary's behalf may yield nothing. The abuses inherent in these agreements are clear but they have very little to do with maintenance and champerty. There is no meaningful litigation involved in establishing a beneficiary's entitlement to a share of an intestate estate.<sup>54</sup> There is no defendant to 'oppress' by taking over someone's law suit and using it against. It is true that if the heir-locator employs a solicitor to prove the beneficiary's entitlement that solicitor is likely to be in a conflict of interest situation, representing both heir-locator and beneficiary. As the heir-locator's agent the solicitor will be engaged in maximising returns for that client, and as the beneficiary's agent the solicitor should be advising that the standard heir-locator contingency fee is not in the beneficiary's best interests. But this is not maintenance and champerty. The heir-locator seems to be controlling recovery of the beneficiary's entitlement but not intermeddling in litigation or other conduct that constitutes an abuse of legal process. Maintenance and champerty are effective tools for invalidating these agreements because, on the face of things, every heir-locator agreement would be tainted by maintenance and champerty. However, if challenged on the grounds of misrepresentation or unconscionability the case against the heir-locator contingency fee agreement may not be proved.<sup>55</sup>

In *O'Keeffe v Scales* the Supreme Court decided that staying an allegedly maintained action before it had been tried was generally inappropriate. The better course was to allow the action to proceed to trial and allow the defendant to seek a third party costs order against the funder if it won.<sup>56</sup> *Thema*<sup>57</sup> has been shown to be a case containing much assertion that TPLF is illegal in Ireland but precious little in the way of authority or cogent reasoning to demonstrate this. *Greenclean Waste* cannot possibly be seen as supporting principle 12 in the *SPV Ovus* case in any way. This is the context in which Costello J's dismissal of the utility value of decisions from other jurisdictions falls to be seen. Which is better – decisions from other jurisdictions that are on the point or decisions from Irish courts that for the most part are not? Costello J did acknowledge that the law on maintenance and champerty was evolving and that what was contrary to public policy 50 years ago may be acceptable today.<sup>58</sup> To some extent this highlights the potency of Hogan J's judgment in *Greenclean Waste* but it barely gets beyond paying lip service to that decision and certainly does not redeem the quite inaccurate line taken in relation to TPLF.

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<sup>53</sup> This is likely to lead the heir-locator into making misrepresentations to the beneficiary as the facts of the Irish High Court decision in *McElroy v Flynn* [1991] ILRM 294 (Blayney J) clearly show.

<sup>54</sup> The Court of Appeals of Wisconsin declined to find an heir-locator contingency fee agreement invalid for maintenance and champerty on this ground in *In the Matter of the Estate of Katze-Miller*, 158 Wis. 2d 559 (1990), 463 N.W. 2d 853.

<sup>55</sup> For discussion of the Irish cases on heir-locator contingency fee agreements see D. Capper, 'The Heir-Locator's Lost Inheritance' (1997) 60 *MLR* 286.

<sup>56</sup> For comment see D. Capper, 'Staying a Maintained Cause of Action' (1998) 114 *Law Quarterly Review* 563. The Court of Appeal similarly refused to stay an allegedly maintained cause of action in *Stocznia Gdanska SA v Latreefers Inc* [2000] EWCA Civ 36, [2001] 2 *BCLC* 116.

<sup>57</sup> *Supra* n. 32.

<sup>58</sup> [2015] IEHC 602, at para 43.

Finally we come to *Persona Digital Telephony Ltd v Minister for Public Enterprise*.<sup>59</sup> As the first instance judge, Donnelly J, acknowledged, this was the first case to come before the courts in Ireland directly concerning the validity of TPLF.<sup>60</sup> In holding that TPLF contravenes the rules on maintenance and champerty in Ireland it is apparent that the judge struggled with the issue and felt that as a first instance judge she should really leave the possible acceptance of TPLF to a higher court. She acknowledged the general agreement between the parties that the rules of maintenance and champerty were derived from a time when the justice system lacked the strength and impartiality to resist the oppression of private individuals by unscrupulous men of power.<sup>61</sup> She pointed to the retention of the torts and offences of maintenance and champerty by the Statute Law Revision Act 2007 as a marked difference from England and Wales.<sup>62</sup> Later on she said that the 2007 Act was not determinative of the issues before the court but was significant. She added that it was indicative of the continuation of all the ingredients of the torts and offences of maintenance and champerty subsisting at the time of its enactment.<sup>63</sup> Authorities from foreign jurisdictions were acknowledged to be of relevance but the court had to be cautious about the weight to be attached to them because of the legislative changes that had occurred in those jurisdictions.<sup>64</sup>

The Supreme Court dismissed an appeal from Donnelly J's judgment.<sup>65</sup> In relation to maintenance and champerty there is nothing new in any of the majority judgments. The access to justice argument for TPLF was acknowledged, particularly by Clarke J, as was the perceived need for an international trading state to embrace modern means of funding expensive commercial litigation.<sup>66</sup> Ultimately the view was taken that decisions of Irish courts over the last quarter century had crystallised into a firm rule against this kind of litigation support. The majority were reticent about the regulatory issues discussed in the next section of this article, believing that these made legislation a better way to reform the law if that were felt to be necessary.

What this series of decisions by the Irish courts come to is this. TPLF is unlawful in Ireland, tortious and criminal, without regard to whether the third party funder intermeddles in the litigation or is pursuing any agenda over and above providing funding to support the plaintiff's case. The torts and crimes of maintenance and champerty are committed by the mere fact that the funder provides financial support in return for a share of any damages the plaintiff may recover. Irish courts rely on no meaningful authority for this position and have never coherently explained their position in terms of principle. Decisions on point from other jurisdictions familiar with the principles of maintenance and champerty have mainly been explained away in terms of the abolition of the torts and crimes of maintenance and champerty in those jurisdictions. This is a distinction of exceedingly minor significance as those jurisdictions have retained maintenance and champerty as rules of

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<sup>59</sup> [2016] IEHC 187 (HC), [2017] IESC 27 (SC).

<sup>60</sup> [2016] IEHC 187, at para 2.

<sup>61</sup> *Ibid*, at para 24.

<sup>62</sup> *Ibid*, at para 27.

<sup>63</sup> *Ibid*, at para 73.

<sup>64</sup> *Ibid*, at para 62.

<sup>65</sup> [2017] IESC 27. Denman CJ, Clarke J, McMenamin J and Dunne J were in the majority, with McKechnie J dissenting.

<sup>66</sup> See Denman CJ's judgment at para 54 (vi).

public policy, and one (New Zealand) has retained the relevant torts and crimes while permitting litigation funding. It is the retention of those rules of public policy that determine whether the third party can enforce the funding agreement. Other jurisdictions have faced up to the stark reality that without financial backing from third parties access to justice would be denied to claimants with viable civil claims. It cannot possibly be the case that this is an unknown phenomenon in Ireland, as indeed some of the judgments discussed above have acknowledged. None of this is to say that there are no problems with TPLF or that this is an industry not requiring regulation in any way. It is only to say that a blanket ban on TPLF on the ground that it constitutes maintenance and champerty *per se* is difficult to justify.

However, before addressing these issues it should be acknowledged that the acceptance of TPLF by the courts in Ireland would represent significant change. Judicial law reform on a similar scale to what might prove necessary has been undertaken before, the asset freezing order (previously known as the *Mareva* injunction) being one example. Like TPLF there was nothing much that prevented the courts changing the law in that context.<sup>67</sup> It was just that the remedy sought had not been granted before. Judicial reticence to undertake reform on that potential scale comes from the realisation that reforming judgments often leave many further issues to be resolved at a later stage. The judicial process has to concentrate on resolving the issues between the parties and cannot anticipate and provide for wider issues.<sup>68</sup> It is not just a question of *whether* the law on TPLF should be reformed but also *how* it should be reformed. To this question we now turn.

### 3. Benefits, Detriments, and Regulatory Issues

There seems to be no doubt that, at least for high value claims,<sup>69</sup> TPLF offers access to justice for claimants who may be unable to afford to undertake civil litigation otherwise. In *Gulf Azov Shipping Co Ltd v Idisi* the Court of Appeal of England and Wales said that “[p]ublic policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those involved in litigation have the benefit of legal representation.”<sup>70</sup> In England the Civil Justice Council has come out strongly in favour of TPLF provided the industry is properly regulated,<sup>71</sup> an issue that will be discussed in more detail below. In Sir Rupert Jackson’s Review of Civil Litigation Costs the view was expressed that it was clearly better for a litigant to forfeit a portion of its damages than to recover nothing at all through the inability to take the case to court.<sup>72</sup> The obstructions in the way of the claimant’s access to justice are first, the need to obtain cover

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<sup>67</sup> See D. Capper, ‘The *Mareva* Injunction – From Birth to Adulthood’, in E. O’Dell (ed), *Leading Cases of the Twentieth Century* (2000, Dublin, Round Hall), 255.

<sup>68</sup> See P.S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law* (1987, Oxford, OUP), p. 142.

<sup>69</sup> *Supra* n. 2.

<sup>70</sup> [2004] EWCA Civ 292, at [54].

<sup>71</sup> Civil Justice Council, *The Funding of Litigation: Alternative Funding Structures* (June 2007), at p. 53, recommendation 5.

<sup>72</sup> *Review of Civil Litigation Costs: Final Report* (December 2009) (the Jackson Final Report), chapter 11, paras 1.2 and 2.12.

for the claimant's lawyers' own professional fees and disbursements, save to the extent that the claimant's lawyers are prepared to run the case on a speculative basis. And secondly, the need to obtain cover against a liability to pay the defendant's costs should the claim be unsuccessful. As the following sub-section demonstrates another advantage of TPLF is that it offers defendants some assurance that their costs can be recovered in the event that the claim fails.

At this stage it is possible to dismiss one often repeated objection to TPLF. This is that it might encourage the funding of vexatious litigation and blackmail settlements. Concern has been expressed that it might herald a repeat of the problems caused by claims management companies in England that occurred after the introduction of conditional fee agreements (CFAs).<sup>73</sup> These fears are almost certainly groundless. The Litigation Funding Research Report found that TPLF is supporting a very different kind of litigation from CFAs.<sup>74</sup> CFAs were abused to bring a large number of low value claims designed to yield a quick return on investment. Defendants often decided that buying off this litigation with nuisance settlements was the more efficient way to deal with them. TPLF funds high value claims that require a considerable amount of research to be done by the funder before support is extended. The funder is interested in high yield investments and often has to wait a long time before receiving any return. Cases are screened very carefully to make sure that they offer sound prospects of producing an enforceable judgment. The risk of having to pay costs for unsuccessful litigation strongly militates against backing speculative litigation. Nuisance settlements are not offered in these cases and would not be of much interest to funders in any event.<sup>75</sup>

It was stated above that several common law jurisdictions had embraced TPLF.<sup>76</sup> In Australia this is the usual way of funding class actions, mainly in investor securities cases.<sup>77</sup> In Canada TPLF has also been extensively used in class actions.<sup>78</sup> In the United States it has been used in a wide variety of litigation although it has not much penetrated the class action market.<sup>79</sup> Prevalence in class actions does not mean absence from conventional two-party litigation. It means that this is the principal way in which TPLF offers access to justice outside of high value commercial claims.

Two important common law jurisdictions were conspicuously absent from the list above – Singapore and Hong Kong. The Singapore Court of Appeal reaffirmed the continued applicability of maintenance and champerty in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd*,<sup>80</sup> recognising only a third party's legitimate interest in the case itself as an exception.

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<sup>73</sup> See Better Regulation Task Force, *Better Routes to Redress* (London, 2004). Part 2 of the Compensation Act 2006 was enacted to regulate claims management companies. For comment see Rebecca Herbert, 'The Compensation Act 2006' (2006) *JPI Law* 337.

<sup>74</sup> *Supra* n. 1, at 123.

<sup>75</sup> In support of all these arguments see Puri, *supra* n. 14, at 558; Mulheron and Cashman, *supra* n. 13, at 317; Kaladjic *et al*, *supra* n. 3, at 101.

<sup>76</sup> *Supra* n. 30.

<sup>77</sup> See M. Legg, E. Park, N. Turner, and L. Travers, 'The Rise and Regulation of Litigation Funding in Australia' (2011) 38 *Northern Kentucky L. Rev.* 625, at 628; Kalajdzic *et al*, *supra* n. 3, at 97.

<sup>78</sup> Kalajdzic *et al*, *ibid*, at 114.

<sup>79</sup> See Dietsch, *supra* n. 30, at 706, and Kalajdzic *et al*, *ibid*, at 96.

<sup>80</sup> (2007) 1 SLR(R) 989.

However by the Civil Law (Amendment) Bill 2016, expected to become law sometime in 2017, the relevant minister is empowered to make regulations designating dispute resolution proceedings that would be exempted from the laws of maintenance and champerty, subject to conditions included in those regulations. In Hong Kong the Law Reform Commission has proposed that TPLF should be allowed for arbitration proceedings regulated by a code of practice.<sup>81</sup> In light of the widening acceptance of TPLF around the common law world one has to wonder how long Ireland can continue to hold out against it. Maintenance and champerty have not been abolished in any of the jurisdictions previously discussed and it is not proposed to abolish the ancient principles in Singapore and Hong Kong either. On the contrary, maintenance and champerty are retained as rules of public policy for cases where “unruly corporations employ ruthlessly aggressive litigious processes against business rivals, hiding behind nominal litigants if need be.”<sup>82</sup> There is simply a growing recognition that the provision of financial support to bring a case in return for a share in the claimant’s recovery does not by itself constitute maintenance and champerty. These principles have their role in policing conduct which goes beyond the simple case. The issue Ireland has to address is not so much whether TPLF should be allowed as under what conditions it is to be allowed?

### *Meeting the defendant’s costs*

Ireland follows the ‘loser pays’ rule with regard to costs that applies in most other common law jurisdictions. This means that if the case fails the claimant is liable to pay the defendant’s costs. The litigation funding agreement (LFA) may specify that the funder will pay the defendant’s costs in that event and where it does the funder’s fee may be higher than where it does not. In England, whether or not the LFA makes the funder liable to pay the defendant’s costs as between the funder and the client, the defendant may seek a third party costs order against the funder under section 51(3) of the Senior Courts Act 1981. In *Excalibur Ventures LLC v Texas Keystone Inc and Ors* the Court of Appeal stated that a third party costs order would usually be made against the funder of a losing claimant.<sup>83</sup> This was the price that funders had to pay for their entitlement to profit from supporting successful litigation. It did not depend on the funder or the funded party being guilty of any litigation misconduct or the funder failing to do adequate ‘due diligence’ on the case prior to offering support. However, as already mentioned,<sup>84</sup> at present the funder’s obligation to pay costs to the successful defendant is limited to the sums advanced to support the claimant.

It is right that litigation funders should be required to pay costs to the successful defendant and this is a position that Ireland is probably going to have to adopt if it embraces TPLF. It is to a certain extent an access to justice issue for defendants, although not in the same way as for claimants. If a defendant could not find the funds for its defence it might not be a party against whom a judgment could be enforced. Funders seeking profit are not likely to

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<sup>81</sup> Third Party Funding for Arbitration Sub-committee Consultation Paper, *Third Party Funding for Arbitration* (2015).

<sup>82</sup> New Zealand Law Commission, *Subsidising Litigation* (No 72, 2001), at 10.

<sup>83</sup> [2016] EWCA Civ 1144.

<sup>84</sup> *Supra* n. 26 and text.



finance litigation unless the prospects of winning *and* enforcing judgment are high.<sup>85</sup> But even if a successful defendant can pay its costs there is the potential for hardship and almost certainly unfairness in making it do so. Defendants do not have the same choice as claimants whether to litigate, and should be entitled to recover this expense against the funder who made it necessary.

What should be the position with regard to the 'Arkin cap'? There have been calls for its abolition and for the defendant to be able to recover all its standard costs from the funder.<sup>86</sup> The case is strong because the *Arkin* decision came relatively early on in the history of TPLF in England and clearly represented a pragmatic compromise designed to ensure that the law of unintended consequences did not scupper the industry altogether. More than a decade on there is surely reason to believe that TPLF would suffer no serious damage if funders had to meet all of a defendant's standard costs.

### *Security for costs and disclosure*

If the defendant can obtain a third party costs order against the funder it seems reasonable that the defendant should also be entitled to seek security for the funder's potential costs liability. This is not simply a question of fairness to the defendant but also a matter of ensuring that only funders of substance are able to provide TPLF.<sup>87</sup> The Civil Procedure Rules in England and Wales r.25.14(2)(b) enables the defendant to apply for security for costs against a party that "has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings, and is a person against whom a costs order may be made." But how is a defendant going to be able to seek security for costs against the funder unless it knows that a litigation funder stands behind the claimant?

If the defendant seeks security for costs against the claimant the existence of the LFA may be voluntarily disclosed to ward off the need for the claimant to post security. This may result in the defendant accepting that its chances of recovering costs are sufficient to require no further action to be taken or it may prompt the defendant to seek an order under CPR 25.14(2)(b). Can the defendant obtain discovery of the existence of the LFA and its terms? Should disclosure of the existence of the LFA and its terms be required at an early stage of the litigation? The Litigation Funding Research Report found that funders preferred the disclosure of the existence of the funding agreement because once a defendant knew the claimant was backed by a reputable funder who had researched the case and decided it was a suitable one to support, it was more likely to offer terms of settlement.<sup>88</sup> To that extent the problem may be avoided but it cannot just be assumed that this question will never need to be addressed.

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<sup>85</sup> See Mulheron and Cashman, *supra* n. 13, at 317, quoting Susan Dunn, then head of Harbour Litigation Funding, saying 55 cases were being funded but approximately 500 had been rejected "mostly on lack of enforceability".

<sup>86</sup> See the Jackson Final Report, *supra* n. 71, chapter 11, paras 4.3-4.7; Mulheron, *supra* n. 14, at 587-588.

<sup>87</sup> See Legg *et al*, *supra* n. 77, at 653.

<sup>88</sup> Litigation Funding Research Report, *supra* n. 1, at 78, and 106.

In England there is no power in the Civil Procedure Rules to order disclosure of either the identity of the funder or the terms of the LFA. There is common law support for ordering disclosure of the identity of a funder under the inherent jurisdiction of the court as an order ancillary to a non-party costs order.<sup>89</sup> In *Waterhouse v Contractors Bonding Ltd*<sup>90</sup> the New Zealand Supreme Court held that the fact that the claimant was being funded under an LFA, the identity of the funder, and whether the funder was subject to the jurisdiction of the New Zealand courts, were all matters that should be disclosed to the other party as a matter of course when the litigation is commenced. The Federal Court of Australia has determined that at, or prior to, the initial case management conference, each party is expected to disclose any agreement by which a litigation funder is to pay or contribute to the costs of the proceedings, any security for costs or any adverse costs order.<sup>91</sup> This goes further than England or New Zealand in that the terms of the LFA may have to be disclosed. In recognition of the considerable litigation advantage that would be conferred by disclosure of the full terms of the LFA the Federal Court held, in *Coffs Harbour City Council v Australian and New Zealand Banking Group Ltd*,<sup>92</sup> that certain terms could be redacted. Among these are the funder's fee, including the percentage amounts and other rewards the funder would be entitled to on settlement; how disagreement between the funder and the claimant was to be resolved; and how the LFA could be terminated. In *Thema International Trust Fund Plc v HSBC Institutional Trust Services (Ireland) Ltd* Clarke J showed a clear awareness of the advantage that could be conferred on a defendant if it acquired information about the claimant's litigation strategy.<sup>93</sup> If Ireland embraces TPLF it may be better, at least initially, to limit disclosure of a LFA to its existence and the identity of the funder.

### *Maintaining capital base*

When entering the market for litigation funding a funder needs a healthy capital base.<sup>94</sup> Complex high value litigation tends not to produce quick returns on investment. Cases lost may expose the funder to third party costs orders and liability under any earlier security for costs provision. As an indication of the scale of costs a funder may be liable for, note may be taken of the disastrous litigation in *Excalibur Ventures LLC v Texas Keystone Inc*.<sup>95</sup> In this case funders had advanced £17.5 million to the claimants to enable them to comply with security for standard costs orders made against them. This proved insufficient because the judge held the litigation to be speculative and misconceived and ordered the claimants to pay costs on an indemnity basis.

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<sup>89</sup> *Reeves v Sprecher* [2007] EWHC 3226 (Ch), [2009] 1 Costs LR 1; *Merchantbridge & Co Ltd v Safron General Partner 1 Ltd* [2011] EWHC 1524 (Comm), [2012] 2 BCLC 291.

<sup>90</sup> [2013] NZSC 89.

<sup>91</sup> Federal Court of Australia, *Class Actions Practice Note (GPN-CA)* (25 October 2016), para 6.

<sup>92</sup> [2016] FCA 306. The *Class Actions Practice Note*, *ibid*, permits redaction in respect of any information which might reasonably be expected to confer a tactical advantage on another party. This includes information about the case budget, estimates of litigation costs, funds available to the litigant, and anything indicating an assessment of the merits of the claim.

<sup>93</sup> [2011] IEHC 357, at [5.9].

<sup>94</sup> *Legg et al*, *supra* n. 77, at 672.

<sup>95</sup> [2016] EWCA Civ 1144; D. Capper, 'Litigation funder's liability for costs' (2017) 36 *CJQ* 287.

There is also the need to meet financial commitments to funded parties on an ongoing basis, not leaving them with costs' liabilities they cannot meet because the funder has become insolvent. The current version of the Association of Litigation Funders (ALF) Code of Conduct requires by clause 9.4.1 that funders maintain the capacity to pay all debts when they become due and payable and cover all aggregate funding liabilities under all of their funding agreements for a minimum period of 36 months; and by clause 9.4.2 that they maintain access to a minimum of £2 million of capital (or such other amount as may be stipulated by the Association). This is higher than the previous adequacy standards, considered insufficient by the Jackson Report.<sup>96</sup> By clause 9.4.3 a funder is obliged to notify the Association and the funded party if it reasonably believes that its representations in respect of capital adequacy are no longer valid. By clause 9.4.4 it must be annually audited by a recognised national or international audit firm and provide the Association with a copy of the audit opinion within one month of receipt. The sanction for failing to meet capital sufficiency requirements is expulsion from the Association.<sup>97</sup> Mulheron has pointed out that neither the Code nor the state in England requires any industry wide indemnity fund and, so far as she understood, no funder carried professional indemnity insurance.<sup>98</sup> The Litigation Funding Research Report suggested that the risk of a funder's insolvency could be satisfactorily covered by a compulsory payment into a Financial Services Compensation Scheme.<sup>99</sup>

There appear to be some gaps in the current regulation of litigation funders' capital maintenance requirements. The ALF Code is voluntary and Mulheron recently pointed out that only seven out of 16 recognised funders in England had subscribed to it.<sup>100</sup> The funders in the *Excalibur* case were not members of ALF. Yet there appears to be no other regulatory code, either voluntary or compulsory, in any other jurisdiction.

### *Interfering in litigation*

Funders' tendency to select their cases carefully to maximise the chance of profit and minimise the risk of loss raises concern about whether they might intermeddle in litigation to an extent that they fall foul of the rules on maintenance and champerty. In the English cases discussed above, where the courts have decided that TPLF is not *per se* maintenance and champerty, it has been emphasised that so long as the funder essentially *funds* but does not *run* the litigation these rules are not infringed.<sup>101</sup> At the same time funders are investing a lot of money in cases and should be entitled to take steps to protect their investment. Indeed their expertise may often be valuable to the client being funded.<sup>102</sup> The line between legitimate protection of investment and the illegitimate taking over of litigation is a fuzzy one. The principal 'tension points' between them are now turned to.

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<sup>96</sup> Three months, *supra* n. 71, at para 2.10.

<sup>97</sup> Mulheron, *supra* n. 14, at 577.

<sup>98</sup> *Ibid*, at p. 574.

<sup>99</sup> *Supra* n. 1, at p. 80.

<sup>100</sup> Mulheron, *supra* n. 14, at 578.

<sup>101</sup> *Supra* ns 7-25.

<sup>102</sup> Litigation Funding Research Report, *supra* n. 1, at p. 78.

The ALF Code attempts to deal with several issues pertaining to funders' intermeddling in litigation. A funder is required by clause 9.1 to take reasonable steps to ensure that the litigant receives independent advice on the terms of the funding agreement prior to its execution. Advice from the funded party's solicitor or barrister instructed in the dispute will suffice for this. This does not specifically state that the lawyer representing the litigant is chosen by the litigant, and in *Giles v Thompson* the House of Lords had no problem with the lawyer being chosen by the funder.<sup>103</sup> However where there is an ongoing business relationship between the claimant's lawyer and the funder and one has recommended the other the claimant may not receive truly independent advice.<sup>104</sup> Puri's recommendation that in this context the claimant's lawyer should advise the client to seek independent advice about the terms of the LFA from another lawyer may go some way towards addressing this issue.<sup>105</sup>

Clause 9.2 requires the funder not to take any steps that cause or are likely to cause the litigant's solicitor or barrister to act in breach of their professional duties. Clause 9.3 requires the funder not to seek to influence the litigant's solicitor or barrister to cede control or conduct of the dispute to the funder. These provisions deal mainly with conflict of interest situations. The area where there is most scope for conflict concerns settlement offers. Funders and lawyers see settlement offers as a means of being paid whereas the client wants recompense for perceived wrong. The different parties may thus have different ideas of what constitutes a satisfactory settlement. It is the client's case and (s)he ought to have the final decision on settlement. At the same time the case could not have been brought without the funder's support and the investment committed is frequently considerable so funders should have the right to be consulted. *Arkin v Borchard Lines Ltd* may have gone too far by accepting a funding agreement where the consent of the funder to any settlement was needed.<sup>106</sup> The decision of the Jersey Royal Court in *Re Valetta Trust* was rather better in that the funder was entitled to be kept informed of the progress of the proceedings and the client agreed to conduct the litigation "in accordance with the reasonable advice of its lawyers."<sup>107</sup> Much would depend here on whether the lawyers are truly independent of the funder. Clause 11.1 of the ALF Code attempts to make reconciliation of the conflicting considerations here a matter for agreement between the parties, by specifying that the LFA shall state how the funder may provide input into the client's decision about settlement. Yet it is doubtful whether maintenance and champerty, concerned with the corruption of public justice, can be made the subject of private agreement. Ultimately it is very difficult to make detailed rules about how this area is to be regulated. There is merit in the recommendation of Mulheron and Cashman that the funder should be able to see what work has been done and that the invoices are reasonable; beyond that it should be consulted about any settlement entered into.<sup>108</sup> What consultation actually means can be left to the good sense of members of the ALF. As the Litigation Funding Research Report showed, they are careful not to put their investment at

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<sup>103</sup> [1994] AC 142.

<sup>104</sup> Kalajdzic *et al*, *supra* n. 3, at 121-122.

<sup>105</sup> Puri, *supra* n. 14, at 564.

<sup>106</sup> [2005] EWCA Civ 655, [2005] 2 Lloyd's Rep 187.

<sup>107</sup> [2012] 1 JLR 1.

<sup>108</sup> *Supra* n. 13, at 334-335.

risk by transgressing the rules on maintenance and champerty,<sup>109</sup> and if they have sufficient confidence in the claimant's lawyers they would not need to.<sup>110</sup>

Two other anti-champerty factors are also relevant, the size of the funder's fee and the willingness of funders to meet the claimant's costs' liability and to post security for costs. Mulheron and Cashman have pointed out that no 'brightline' figure has emerged for an acceptable funder's fee. They cite *Operation 1 Inc v Phillips*,<sup>111</sup> a decision of the Ontario Superior Court of Justice, as an example of a fee so high (80% of recoveries above \$178,000 in a claim for over \$3 million) as to be champertous. A success fee of 33% was considered acceptable in the Australian class action proceedings in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*,<sup>112</sup> the very expensive nature of the proceedings being an important factor. The English Court of Appeal found 8% unproblematic in the quantum only proceedings of *R (Factortame Ltd and Ors) v Secretary of State for Transport, Local Government and the Regions (No 8)*,<sup>113</sup> Lord Phillips MR remarking that the higher the share of the spoils "the greater the temptation to stray from the path of rectitude."<sup>114</sup> The same court passed no adverse comment on the 25% fee in *Arkin v Borchard Lines Ltd*,<sup>115</sup> and in *Stocznia Gdanska SA v Latreefers Inc*<sup>116</sup> a 55% share was considered acceptable where the funder had a commercial interest in the dispute.<sup>117</sup> The significance of the size of the funder's fee lies in what it says about the motive of the funder in supporting the litigation. The closer the relationship between the fee and the risk being borne by the funder the easier it is to see the funder's motive as one of supporting the claimant's case rather than pursuing some project of its own. Similarly, as Mulheron has pointed out, an LFA that states a willingness by the funder to meet adverse costs orders is also indicative that the funding agreement involves no corruption of justice.<sup>118</sup>

### *Power to terminate*

There is a need here to ensure that the funder cannot arbitrarily withdraw funding as a means of acquiring improper leverage over how the case is managed or settled. At the same time a funder should not be required to continue funding a case when it seems clear that the chances of obtaining an enforceable judgment have much reduced since the original decision to provide support. Even when the funder's due diligence was exemplary at the time of the decision to support, there will occasionally be changes in circumstances that justify a review of that original decision. Withdrawing will mean that the claimant either has to proceed alone or abandon the case. Either way the issue of costs incurred prior to the funder's withdrawal must be addressed.

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<sup>109</sup> *Supra* n. 1, at 35.

<sup>110</sup> *Ibid*, at 77.

<sup>111</sup> (2004) 248 DLR (4<sup>th</sup>) 349.

<sup>112</sup> [2006] HCA 41.

<sup>113</sup> [2002] EWCA Civ 932, [2003] QB 381.

<sup>114</sup> *Ibid*, at [84]-[85].

<sup>115</sup> [2005] EWCA Civ 655, [2005] 2 Lloyd's Rep 187.

<sup>116</sup> [2000] EWCA Civ 36, [2001] 2 BCLC 116.

<sup>117</sup> Mulheron and Cashman, *supra* n. 13, at 338-339; Mulheron, *supra* n. 14, at 584.

<sup>118</sup> *Ibid*, at 585, citing *Latreefers*, *supra* n. 115, and *Valetta Trust*, *supra* n. 107.

Clauses 11.2 to 13 of the ALF's Code address these issues in a balanced and fair way. Clause 12 states that a funder can only terminate an LFA on the grounds specified in clause 11.2. Those grounds are that the funder (a) reasonably ceases to be satisfied about the merits of the dispute; (b) reasonably believes that the dispute is no longer commercially viable; or (c) reasonably believes that there has been a material breach of the LFA by the funded party. If the funder terminates the LFA on any of these grounds clause 13.1 still requires it to honour funding obligations incurred prior to termination except in the case of material breach of the LFA by the funded party. In the event that there is any dispute between the funder and the funded party about termination (or settlement) clause 13.2 requires a binding opinion to be obtained from a Queen's Counsel instructed jointly or nominated by the Chairman of the Bar Council.

### *Self or Public Regulation?*

The current English system of self-regulation of the litigation funding 'profession' seems to be the only system of regulation of litigation funding anywhere in the world. Yet, doubts have been expressed as to whether self-regulation is sufficient or whether statutory or some other form of compulsory regulation should be required. The Jackson Report, noting that most users of TPLF were commercial parties, advised that self-regulation would be sufficient given a satisfactory code to which all litigation funders subscribed.<sup>119</sup> As Mulheron has pointed out, only seven out of 16 recognised funders were at time of writing (2014) members of the ALF so Sir Rupert Jackson's advice was not then being followed.<sup>120</sup> However, subsequent to his Final Report Sir Rupert suggested that this might not be such a problem because solicitors would be expected to advise clients only to use funders who subscribed to the Code.<sup>121</sup> The *Excalibur* case may be indicative of some wishful thinking on Sir Rupert's part as the funders were non-members of ALF and the claimants' solicitors were Clifford Chance! Jackson had also recommended that as litigation funding expanded, particularly into group actions,<sup>122</sup> statutory regulation would be desirable. In Hong Kong it has been recommended that TPLF for arbitration proceedings should be the subject of a voluntary self-regulatory code for three years, after which the Department of Justice should consider if a statutory code or regulation by a public body was required.<sup>123</sup> It is argued here that the recent disastrous litigation funded by non-members of ALF in *Excalibur Ventures LLC v Texas Keystone Inc & Ors*<sup>124</sup> strongly supports the recommendation of the Litigation Funding Research Report that statutory regulation would be a much more effective way of dealing with the rogue trader problem as well as offering an independent check upon the industry.<sup>125</sup>

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<sup>119</sup> *Supra* n. 72, at paras 2.4 and 2.12.

<sup>120</sup> Mulheron, *supra* n. 15, at 578.

<sup>121</sup> Jackson LJ speech, *Third Party Funding or Litigation Funding* (Royal Courts of Justice, 23/11/11), at para 4.1.

<sup>122</sup> *Supra* n. 72, at paras 2.12 and 3.4.

<sup>123</sup> *Third Party Funding for Arbitration* Report, *supra* n. 80, final recommendation 3.8.

<sup>124</sup> [2016] EWCA Civ 1144. See *supra* n. 95 and text.

<sup>125</sup> *Supra* n. 1, at 145.

#### 4. Conclusion

In light of the recent embracing of TPLF by Singapore and Hong Kong, hitherto the only other common law jurisdictions holding back from accepting it, Ireland's current rejection of TPLF is beginning to look somewhat Luddite. Of course Singapore and Hong Kong are major commercial centres clearly anxious to tap into the revenue stream available from commercial litigation. In the common law jurisdictions that have embraced TPLF its use in party against party litigation has overwhelmingly been in the area of high value commercial claims. It cannot be said to be a solution to the access to justice problem faced by many personal litigants today. It does offer access to justice for businesses who lack the means to engage in litigation against well-resourced defendants, and these parties have access to justice rights too. If TPLF gets the go-ahead it may expand to other kinds of litigation, including group actions, but even if it does not this is not a reason to reject it.

Ireland's objection to TPLF is grounded in the belief that the funding of another's litigation constitutes maintenance and champerty without more. This has been shown to be an untenable proposition. The answers to Questions 6 (a), (b), (e) and (f) of the Law Reform Commission's Issues Paper<sup>126</sup> are as follows. The crimes and torts of maintenance and champerty should be abolished because they serve no useful purpose. Maintenance and champerty should be retained as rules of public policy and an LFA that infringes those rules should be void. However TPLF does not infringe the rules against maintenance and champerty by the mere fact that a litigation funder provides financial support to a claimant to bring a law case. Ireland should consequently permit TPLF but the courts will have work to do in future distinguishing legitimate litigation financial support from that which genuinely does corrupt public justice. Courts will also have to work out what protection should be given to successful defendants unable to recover costs from impecunious claimants. Wider issues will require a measure of regulation, particularly with regard to capital maintenance and the termination of LFAs. There is sufficient experience available in other jurisdictions to enable a binding statutory code to be drawn up for all litigation funders, thus avoiding the rogue trader problem from the outset. This is not a knee jerk reaction to the debacle that was *Excalibur Ventures*, merely an acknowledgement that those who predicted the problem were right and those who thought the risk was minimal wrong. Ireland should reap the benefits of not needing to learn so much from its own mistakes by setting off on the foot that it is becoming clear others should follow.

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<sup>126</sup> *Supra* n. 7. The questions are worded as follows:-

6(a) Should the crimes and torts of maintenance and champerty be retained or abolished: (a) as crimes; (b) as torts?

6(b) If the answer to 6(a) is that they should be abolished, should evidence that an agreement is champertous render it void?

6(e) Should third party funding of litigation be permitted? If so, in what circumstances?

6(f) If permitted, should third party funding be regulated by legislation or should it be subject to 'self-regulation'?